

Respondent argues that the Board lacks the jurisdiction to review the ALJ's Order in that this appeal only seeks review of whether claimant is temporarily partially disabled. But if the Board finds it has jurisdiction, claimant alleges the Board should find that the ALJ exceeded his jurisdiction by addressing claimant's entitlement to temporary partial disability. And if the Board finds that the ALJ had jurisdiction it should find that the ALJ correctly found that claimant is not entitled to benefits because he voluntarily quit his job with respondent to take another position.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should remain in full force and effect and the appeal by claimant should be dismissed.

This matter came before the ALJ for a preliminary hearing on August 25, 2011. It is uncontroverted that claimant suffered an injury while working for respondent and was being provided medical treatment at Fredonia Medical Center. Respondent willingly provided accommodated work for claimant. Claimant performed this accommodated work until his pain became too much and he chose to quit his job and found another one closer to home. Claimant requested TPD commencing February 7, 2011, and continuing until he reaches a medical plateau or is able to resume substantial, gainful employment. It was claimant's decision to remove himself from the employment.

PRINCIPLES OF LAW AND ANALYSIS

Respondent argues, that the Board is without jurisdiction to decide this matter on appeal from a preliminary hearing. Respondent also argues that *Bergstrom*¹ does not address TPD, but is limited to the good faith issue under K.S.A. 44-510e. Respondent also alleges that K.S.A. 44-534a does not provide for TPD, only temporary total disability.

K.S.A. 44-534a grants the administrative law judge the authority to determine a claimant's request for temporary total disability and ongoing medical treatment at a preliminary hearing. The Board's review of preliminary hearing orders is limited to specific issues as set forth in the statute.

Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to issues where it is alleged the administrative law judge exceeded his or her jurisdiction and the following issues which are deemed jurisdictional:

1. Did the worker sustain an accidental injury?
2. Did the injury arise out of and in the course of employment?
3. Did the worker provide timely notice and written claim of the accidental injury?
4. Is there any defense that goes to the compensability of the claim?²

¹ *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, 214 P.3d 676 (2009).

² K.S.A. 44-534a(a)(2).

This Board Member finds that an administrative law judge has the jurisdiction to make a determination as to what benefits a claimant would be entitled to at a preliminary hearing. The Board, however, is limited in its scope of review on an appeal from a preliminary hearing. Here, the issue as to claimant's entitlement to TPD is not an issue over which the Board has jurisdiction on an appeal from a preliminary hearing order. The ALJ did not exceed his jurisdiction in issuing the denial.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.³ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

The Board does not have jurisdiction over a dispute regarding claimant's entitlement to TPD on an appeal from a preliminary hearing order. The Order remains in full force and effect, and claimant's appeal of this matter is dismissed.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Thomas Klein dated September 2, 2011, remains in full force and effect and claimant's appeal of the Order is dismissed.

IT IS SO ORDERED.

Dated this _____ day of November 2011.

HONORABLE GARY M. KORTE
BOARD MEMBER

c: Kenton D. Wirth, Attorney for Claimant
 Brent M. Johnston, Attorney for Respondent and its Insurance Carrier
 Thomas Klein, Administrative Law Judge

³ K.S.A. 44-534a.